COUNTY ROADS

By

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INTRODUCTION.

In their birth, life, and death, county roads are simple things. If they appear complicated, or arcane, it is because of one's unfamiliarity with them, and because of widespread misconceptions that almost reach the level of folklore. This discussion will attempt to dispel the folkloric notions, and to provide an understanding of county roads, what they are, their creation and nature, and their death (more appropriately called "vacation"). This discussion is not intended to reach the level of a law review article in its thoroughness and authority. And it certainly is not intended to be an exhaustive presentation of all the possible legal arguments that surround the subject. It merely reflects the writer's accumulation of knowledge with enough supporting authority to justify the conclusions presented, and should be thought of, and used, as nothing more than a primer. Hopefully it will be useful in responding, in a general way, to day-to-day situations, as well as be helpful as a springboard to a legal memorandum. It is unlikely anyone will find much in the way of revelation in this discussion; it is merely a summary; it is, in large part, a response to questions often asked.

WHAT IS A COUNTY ROAD?

When dealing with county roads the counties are merely agents of the state. RCW 36.75.020. If a county is merely an agent, then county roads must be state roads, with the name of "county road" for the purpose of distinguishing between state highways and city streets. See below. There seems to be little practical consequence to this provision except to put counties on notice that they do not act totally independently of the State when dealing with roads.

A county road is defined by statutory law. In RCW 36.75.010(6) it is defined as:

> (6) "County road," every highway or part thereof, outside the limits of incorporated cities and towns and which has not been designated a state highway;

A county road is partly defined, then, by exclusion from certain physical locations. There can be no county roads within the

limits of incorporated cities and towns. And yet, look at RCW 36.89.090 which authorizes counties to establish highways within cities and towns.

In an attempt to harmonize RCW 36.75.010(6) and RCW 36.89.090, it will be assumed that a county may establish a highway within a city or town, but that highway will be a city street, not a county road. This assumption does not square, entirely, with the purpose of Chapter 36.89 RCW set forth in RCW 36.89.020, leaving an anomaly in the definition of a county road. This anomaly will be ignored in this discussion.

A county road is partly defined by designation of function; if it is designated as a state highway, it cannot be a county road. In RCW 36.75.010(15) a state highway is defined as:

> (15) "State highway," includes every highway as herein defined, or part thereof, that has been designated as a state highway, or branch thereof, by legislative enactment;

It is easy (in theory at least) to determine what is not a county road. By locating the boundaries of a city or town, and by looking at legislative enactments, a lot of roads will be excluded from the category of county roads.

But whatever else a county road is or is not, it <u>has</u> to be a highway, which in RCW 36.75.010(11) is defined as:

> (11) "Highway," every way, lane, road street, boulevard, and every way or place in the state of Washington open as a matter of right to public vehicular travel both inside and outside the limits of incorporated cites and towns;

And so, by whatever name, if it is ". . . <u>open as a matter of right to public vehicular travel</u> . . ." it is a highway. And, if it is highway that is not a state highway, and not in a city or town, it is a county road.

By way of algebraic substitution, such as in: if A = B = C, then A = C, the above statutory definitions can be consolidated as follows:

> A county road is a highway that is not a state highway, and is outside the limits of a city or town, and is open as a matter of right to public vehicular travel.

There are still at least three unanswered questions in the above definition. What is 1. "open", 2. "as a matter of right", 3. "to public vehicular travel"?

"Open", as opposed to "unopen", is a question of fact not defined by statute, but case law supplies tests for determining the answer.

Chapter 36.87 RCW is the law that governs the vacation of county roads. One of its sections, RCW 36.87.090, provides in part, as follows:

> Any county road, or part thereof, which remains unopen[1] (emphasis added) for public use for a period of five years after the order is made or authority granted for **opening** (emphasis added) it, shall be thereby vacated, and the authority for building it barred by lapse of time . . .

This statute has been called the "nonuser statute".

In earlier years, the question of whether or not a road was open, or unopen, was litigated rather often. The type of "public use" required to open a road seems to have been implicitly assumed to be "public vehicular travel", as that term is used in the definition of highway in RCW 36.75.010(11), see above.

And so, a road is open when a vehicle can drive over it. It is not clear what kind of vehicle, but, presumably, one that is normally operated by members of the public. But what about a trail open only to a motorcycle, or a bicycle? At one time an electric railway would have opened the road, see below. It is presumed a court would find that the "normal" modes of vehicular travel would have to be available, i.e., the automobile. The case law below regarding when a road is open supports that presumption.

In the context of RCW 36.87.090, and its predecessors, courts have found roads to be not open, or to be open, as follows:

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[1] An "unopened county road" is defined in Exhibit "B" to ordinance No. 90-132, the Site Development Regulations, which definition is different from the results of tests used in case law. The County's definition should be used for land use regulation purposes only.

County roads were found to be not opened because:

> . . . [T]he streets were covered with a heavy growth of timber and underbrush, and had never been opened to public travel . . .[.] Murphy v. King County, 45 Wash. 587, 590 (1907). (Comment: Apparently the streets were impassable to a vehicle of that time.)

> The evidence fails to show any formal opening of the way . . .[.] [T]here were foot paths along the lake shore which followed the general course of the platted way . . .[.] [B]ut the evidence convinces us that there never was any opening of the way to the public or any travel upon it as a public way, or any travel at all, except such as occurred incidentally by the following of the old paths. This was clearly insufficient to constitute an opening of the way such as the statute contemplates . . .[.] Cheney v. King County, 72 Wash. 490, 492 (1913). (Comment: Note that there was a lack of evidence of vehicular use or even the possibility of vehicular use.)

> Practically all of the evidence is that the only travel upon Lake avenue (sic) and Carlysle avenue (sic) . . . was casual, intermittent, and inconsequential. . . .[.] [P]hotographs [in evidence] . . . which show stumps, logs and brush in the avenue. . . . The testimony is that they found brush, stumps, and logs, in the streets. Smith v. King County, 80 Wash. 273, 275, 276 (1914). (Comment: Perhaps some use does not open a road. This court found the roads to not be in regular use, and arguably impassable to a vehicle of that time.)

> . . . [C]ampers or homebuilders...angled across intervening lands to the beach wherever there were no natural obstructions, or as suited their convenience, or pleased their fancy. We do not find in the record any satisfactory evidence that there was even a well-defined foot path from Alki avenue (sic) westerly toward the beach . . .[.] Lewis v. Seattle, 174 Wash. 219, 221 (1933). (Comment: Again, no evidence of vehicular use, and also not in regular use.)

County roads were found to be opened and not vacated because:

> For aught that appears in this record...Rainier street (sic) . . . may have . . . been actually physically open for public use, unobstructed, unenclosed and, by nature, well suited for ordinary travel by such means as are in common

use upon public highways. Shall we presume to the contrary, in the total absence of proof upon that question? We are of the opinion that we should not do so, and that the burden of showing that such a street has remained unopened for public use ,for the period named in the statue should be upon those who rest their claims upon such a fact. Nor do we think that the fact that there was no public travel upon the street during the period from its dedication to respondents' taking possession thereof argues that it was unopened for public use during that period. The public is not, under all circumstances, obliged to take physical possession of public highways whether they have been acquired by dedication or otherwise, in order to preserve its rights therein. If a highway is, in fact, physically open to the free use of the public as a highway, we think the public's constructive possession thereof is sufficient to protect its acquired paper title thereto. Brokaw v. Town of Stanwood, 79 Wash. 322, 325, 326 (1914). (Comment: Brokaw provides strong statements of who carries the burden of proof, as well as mentioning "ordinary travel" in "common use".)

The evidence is conclusive to the effect that no public money has ever been expended on the opening or improvement of Austin avenue (sic), but that it has been used continuously since the plat was filed, at first the roadway consisting of a mere wagon track winding between stumps and through obstructing brush, but by the lapse of time and private effort, stumps and other obstacles have decayed or been removed and a well traveled though ungraded roadway has existed for a considerable time. . . . The barn on Knowles' lot, which has stood in its present location for more than twenty-five years...extending into and occupying the westerly half of Austin avenue (sic), while not free from obstructions, [the road] was yet opened for use . . .[.] Vetter v. K. & K. Timber Co., 124 Wash. 151, 152, 153, 154 (1923). (Comment: Note the lack of county involvement in creating the roadway, but the road was found to be opened, nevertheless.)

'Q. Have you observed any trails that are alleged to have been McCallister Road? A. Yes. Q. About how wide are they? A. In terms of a car width the brush touches both sides in many instances. . . . A. There was a drivable path, I would say, at some abuse of equipment.' . . . Mr. Gonnason, assistant county engineer for King County, testified that the...engineer's file . . . did not contain a copy of the order establishing the road nor did the file

> indicate that the county had expended any sums to maintain the road. ...A public road does not lose its character as a public road because no public funds are expended for its maintenance and upkeep. Goedecke v. Viking Inv. Corp., 70 Wn.2d 504, 508, 509 (1967). (Comment: It clearly doesn't take much, but there does, in fact, have to be a roadway capable of allowing vehicular use.)
>
> Construction of electric railway on highway was held to constitute an opening of a highway. Clark v. City of Seattle, 71 Wash. 316, 128 P. 670. (Comment: Perhaps, in those days, an electric railway was "ordinary travel . . . in common use upon public highways". See Brokaw, above. A public bus system in operation on the right-of-way would probably suffice today.)

The above case law implies that if the land is naturally open, even without construction activities, and able to be driven across, the road is open. But that inference seems to arise out of dicta and is probably not reliable.

"As a matter of right" is defined by a combination of facts, statutory law, and case law, and will be discussed below under the nature and creation of a county road. At this point, let us agree, arguendo, that the "matter of right" is an easement. The easement is usually called a right-of-way, and creates in the public the right of passage. More on "easement" and "right-of-way" below.

"Public vehicular travel" is something of an enigma but certainly does not limit the uses of a county road. From the above case law, however, it can be argued that the public has to be able, at least, to drive an automobile over the right-of-way before a county road exists.

And so, in addition to proper jurisdictional location and designation of jurisdictional function, if there is an easement that creates the public's right of passage, and if the road is physically capable of allowing the driving of an automobile over the easement, you have a county road.

In summary, **a county road is a right-of-way over which the public has a legal right of passage, and over which an automobile can be driven, and is not designated as a state highway, and is outside the boundaries of a city or town.**

THE CREATION OF A COUNTY ROAD.

In many of the procedures that can be used to create a county road, there is an express requirement of a finding of public benefit, or necessity, (probably the same thing) before the road can be taken into the county system of roads. Where that requirement is not expressed, it can usually be implied from existing use by the public.

Public benefit or necessity is not required as a finding, or prerequisite, when county roads are created by the procedures of Chapter 36.88 RCW, County Road Improvement Districts. This lack is, of course, entirely consistent with the concept of an assessment district. Because the concept of assessment districts is collateral to this discussion it will simply be asserted that:

> Public benefit, or necessity, is not required in a road improvement district because, by definition, the benefits are special, not general or public.
>
> The statutes that authorize assessment districts have to be strictly construed.
>
> Roads cannot created by a road improvement district. The statute limits work to improvement of county roads, and by definition, a county road is a road that already exists and is open to the public, and further limits the work to existing private roads. Nowhere is in the statute is there authority to create, or establish a road where none is.

Even without a requirement of finding public benefit, or necessity, the limitation to improvement of existing roads guards against a road improvement district creating and taking a wholly useless road into the county road system. The requirement that a road improvement district can only improve existing roads does point in the direction that the roads have some use, at least to those properties benefited by the road improvement.

Procedures which can arguably be used to create a county road are as follows:

1. By being used as a public highway for not less than seven years, where it has been worked and kept up at the expense of the public. RCW 36.75.070.

2. By being used as a public highway for not less than ten years. RCW 36.75.080.

3. By certification by the State Highway Commission to the legislative authority of the abandonment of a portion of a state highway within the county unincorporated area. RCW 36.75.090.

4. By the procedures set forth in RCW Chapter 36.81, Roads and Bridges -- Establishment.

5. By the procedures set forth in RCW Chapter 36.88, County Road Improvement Districts.

6. By dedication after compliance with the provisions of RCW Chapter 58.17, Boundaries and Plats.

7. By the authority provided in Chapter 36.89 RCW, Highways -- Open spaces -- Parks -- Recreation, Community, Health and Safety Facilities -- Storm Water Control.

ANALYSIS OF PROCEDURES FOR ADOPTING EXISTING ROADS INTO THE COUNTY ROAD SYSTEM

1. RCW 36.75.070, Highways Worked Seven Years Are County Roads, provides, in its entirety, as follows:

> All public highways in this state, outside incorporated cities and towns and not designated as state highways, which have been used as public highways for a period of not less than seven years, where they have been worked and kept up at the expense of the public, are county roads.

This section serves two purposes. It provides a statute of limitations for establishment of prescriptive rights, and it also, effectively, puts an affirmative obligation on the county to continue maintaining a road unless the vacation procedures of Chapter 36.87 RCW are followed. Public necessity has been found by performance.

In Todd v. Kitsap County, 101 Wash.2d 245, 676 P.2d 484 (1984) the court held (speculated) that a reason for the statute was that it provided incentive to counties to expend public monies

for development and maintenance of public roads. It was also held that after the requisite 7-year period, the right to sue for inverse condemnation was cut off. Therefore, it appears as though a county is authorized to start across private property with a bulldozer (or some form of equipment), maintain the track for public use for seven years, and a county road has come into being.

The interpretation by the court in the Todd case of the purpose of RCW 36.75.070 seems to fly in the face of other statutory restrictions and creates a large loophole in funding requirements. For instance, such an interpretation allows the county discretion to spend county road funds without following the procedures set forth in the statutes for funding road projects in Chapter 36.82 RCW. The argument against the loophole is especially strong when considered in light of the fact that Chapter 36.75 RCW, Chapter 36.81 RCW (Roads and Bridges -- Establishment), and Chapter 38.82 RCW (Roads and Bridges -- Funds -- Budget) were all adopted as parts of the same session law. In contradiction to the court, apparently the purpose of RCW 36.75.070 was to recognize and deal with situations existing at the time of enactment; not to provide an alternative method of creating a county road. But this writer, as a county lawyer, will not argue with the Todd court.

2. RCW 36.75.080, Highways Used Ten Years Are County Roads, declares all highways that have been used as public highways for a period of not less than ten years, and are not within corporate limits and not designated as state highways, to be county roads. Again, public necessity is found by use. This section sets forth a statute of limitations for establishing prescriptive rights of passage by the public. There does not appear to be any specific intent needed. Merely the casual, and maybe even unintentional or accidental use by the public for ten years or more.

It is expressly said, in this section, that the county is not under a duty to maintain these roads unless adopted as part of the county road system by resolution of the county legislative authority. To read the section that a county may assume improvement and maintenance of such roads without further ado other than passing a resolution, but is not under an obligation to do so, appears to be inconsistent with the legislature's repeated directions to involve the public in decisions of this sort. See RCW sections 36.70.520, 36.70.530, 36.70.540, 36.81.080, 36.81.121, 36.81.130, 36.82.200, and 36.88.060. It is the writer's opinion that the county, in order to comply with the apparent legislative intent, should comply with RCW Chapter 36.81

or 36.88 even though there is not an express requirement to do so.

There is a good discussion and interpretation of RCW 36.75.080 in Primark, Inc. v. Burien Gardens Associates, 63 Wash.App. 900, 823 P.2d 1116 (1992).

3. The purpose of RCW 36.75.090, Abandoned State Highways, is not clear. The purpose could be a straightforward abandonment while preserving the right of the public to use the road for vehicular traffic. If this is the case, the requirement of certification to the county would serve little or no purpose. Therefore, the better reading would be that the state, by compliance with this section, requires the county to accept the road into the county road system. With this reading, RCW 36.75.090 provides another way for a road to become part of the county road system.

4. Chapter 36.81 RCW, Roads and Bridges -- Establishment, provides two alternatives for initiating the establishment procedure. The county legislative authority may do so by original resolution, RCW 36.81.010, or freeholders may do so by petition accompanied by a bond in the penal sum of $300 payable to the county, RCW 36.81.020. Before acting on the petition, the board may require the petitioner to secure deeds and waivers of damages for the right of way from the landowners. RCW 36.81.030.

It is interesting to contrast the procedural and substantive detail required to establish a road under Chapter 36.81 RCW to the casual, perhaps accidental creation of a road under RCW 36.75.080.

After original resolution or receipt of petition, the board shall direct the county road engineer to report upon the establishment of the road under consideration. RCW 36.81.050. The engineer shall examine the road, and if he deems it to be impracticable, he shall so report to the board without making a survey, or he may examine and survey any other practicable route which would serve the purpose intended. If he considers the road as proposed, or as modified practicable, he shall report to the board in writing, giving his opinion:

1. As to the necessity of the road;
2. As to the proper terminal points, general course, and length thereof;
3. As to the proper width of right of way therefor;

4. As to the estimated cost of construction, including all necessary bridges, culverts, clearing, grubbing, drainage, and grading;
5. And such other facts as he may deem of importance to be considered by the board.

Under item 5, the engineer should propose surfacing required, if any, and estimate the cost thereof.

The report shall be accompanied by a correctly prepared map of the road, names of owners of land over which the road passes, field notes, and profile. RCW 36.81.060.

The board shall fix a time and place to hear the engineer's report and give notice thereof. RCW 36.81.070. If the board finds the proposed road to be a public necessity and practicable, it may establish it by proper resolution. RCW 36.81.080.

5. Chapter 36.88 RCW, County Road Improvement Districts, is primarily for the purpose of funding. It allows an area in need of certain public facilities, including roads, to be specially taxed, (called assessments in these instances) either by resolution by the county legislative authority or by petition of landowners affected, to raise funds for the needed improvements. Roads shall be constructed to current standards.

The county legislative authority is the sole judge as to the extent of county road fund participation in any project under this chapter; however, these funds are to be repaid through the assessment process. This authority given a county to participate in the fund is, arguably, contrary to the State constitutional prohibition against lending public funds.

After the completion of any construction or improvement under Chapter 36.88 RCW, all maintenance thereof shall be performed by the county at the expense of the county road funds, at least insofar as roads are concerned. Therefore, one effect of this chapter is to adopt roads as part of the county road system.

The procedures for creating a county road improvement district are straightforward and will not be repeated here. They parallel the procedures of Chapter 36.81 -- Roads and Bridges -- Establishment,

6. A proposed road can be adopted into the county road system pursuant to the procedures set forth in Chapter 58.17 RCW, Plats -- Subdivisions -- Dedications. The procedures for approving

subdivisions and accepting dedications are straightforward and will not be repeated here.

7. Another method by which a road can be adopted as a part of the county road system is provided by Chapter 36.89 RCW, Highways and Open Space, etc. The only distinguishing feature of this chapter is that it gives counties the authority to establish, acquire, develop, construct, and improve highways within cities and towns of the counties. See the above comment on Chapter 36.89 RCW, Highways -- Open Spaces, etc.

THE LEGAL NATURE OF A COUNTY ROAD.

Counties do not own county roads in fee. The public merely has an easement interest, usually called a right-of-way, that gives the public the right of passage.

> Since Burmeister v. Howard, 1 Wash. Terr. 207 (1867), this court has not departed from the rule established in that case, that the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of easement. (Comment: Isn't the age of Burmeister impressive?)

Finch v. Matthews, 74 Wash.2d 161, 167, 443 P.2d 833 (1968).

Caveat: The court may have spoken too broadly in Finch with regards to who owns the underlying fee to a right-of-way. In Burmeister roads and lots that were created by platting were being considered, and the conclusion was that the lots went to the centerline of the roads. In a situation where roads come into being absent a plat, e.g., by dedication or by prescriptive use, it is possible the abutting owner would have no fee title. Another exception would be a road within but along the exterior boundary of a plat. The owner of property immediate adjacent to, but outside the plat might abut the county road, and would probably establish private prescriptive rights to the road, but would never have owned underlying fee, and there is little or no reason to believe fee ownership would be created by use alone, when in common with the public. Also, under the principles of deed construction set forth in Roeder Co. v. Burlington Northern, Inc., 105 Wash.2d 567, 716 P.2d 855 (1986), a deed to abutting property that specifically excludes a right-of-way by metes and

bounds description, would not convey title to the underlying fee of the road.

It is possible for the County to own the underlying fee. For instance, if the County owns land in fee, as it does with Thun Field and Spanaway Lake Park, a county road across such ownership would create a right of passage in the public, i.e., an easement across land owned in fee by the County.

When following the broad principle that the deed shall be construed to effectuate the intention of the parties, see McConiga v. Riches, ____ Wash. App. ____, 700 P.2d 331 (1985), and the intention is for the County to acquire a road right-of-way for the public, call it whatever you want, a road right-of-way has been conveyed and accepted. And, a county road right-of-way is merely an easement.

An interesting situation arose involving the easement nature of county roads in Erickson Bushling v. Manke Lumber Co., 77 Wn. App. 495 (1995). In that case the owner of the underlying fee title of one-half of the county road right-of-way actually adversely possessed ownership from the owner of the fee title underlying the other one-half of the county road right-of-way, all without, in anyway, affecting the county road easement. This particular right-of-way was undeveloped making adverse possession easier.

In order to know the limitations of a county's authority in dealing with a road right-of-way, it is worth considering what kind of easement the public has when it has a right of passage across privately owned property. Broadly speaking, there are two kinds of easement, an easement appurtenant, and an easement in gross. No case has been found that attempts to categorize the easement that is a county road right-of-way, so what follows is merely informed speculation. However, in Olson v. Trippel, 77 Wn.App. 545 (1995), the court discussed a private road easement in terms of "appurtenant" and "in gross" and refers to an "entity" as being one who can have easement-in-gross rights. It seems logical to think of the public as an "entity".

With reference to Washington Real Property Deskbook, Section 15.2:

> An easement is a privilege to use the land of another. State ex rel. Shorett v. Blue Ridge Club, Inc., 22 Wn.2d 487, 156 P.2d 667 (1945). It is an interest in land, but

> not an estate in land. Bakke v. Columbia Valley Lumber Co., 49 Wn.2d 165, 298 P.2d 849 (1956).

And in the Deskbook at Section 15.4:

> An easement appurtenant is an incorporeal right or interest in one estate attached to another estate and affecting the latter estate's enjoyment through beneficial use. Bakke. An easement appurtenant is incapable of existence separate and apart from land to which it is attached, and passes to the heirs or assigns of the owner of the land. Loose v. Locke, 49 Wn.2d 165, 298 P.2d 849 (1956).

Because a county road right-of-way is an easement that is not attached to any particular parcel of land, i.e., it does not benefit a particular property, but only allows the public's right of passage, it cannot be an easement appurtenant.

In the Deskbook at Section 15.4:

> An easement in gross is merely a personal right to use another's land and is not attached to the estate occupied by an owner. 28 C.J.S. Easements Section 4(b) (1941). Instead, it is attached and vested in the person to whom it is granted and is therefor not (underlining added) generally assignable or inheritable. Restatement of Property, Section 454, Comment a (1944).

If a "person" can be defined as a legal person, or entity, then the "public" is "the person to whom [the right-of-way] is granted" as a "personal right to use another's land".

The view that a road right-of-way is an easement in gross personal to the public seems to have been implicitly confirmed in Finch at page 173, where it was said:

> The reason why a county may not effectively make an exchange of road rights-of-way for other rights-of-way is not because of any express statutory prohibition, but because of the reason heretofore discussed; namely, the county does not own the fee . . .[.]

If the county did not own the fee it owned an easement. And if the county road easement at question in Finch had been an easement appurtenant, the only issue would have been whether or not a dominant parcel had been exchanged, not the easement. The

court must have realized that an easement in gross was at issue, and easements in gross cannot be exchanged.

In general, therefore, a road right-of-way cannot be sold, exchanged, given, or in any way conveyed. The only thing the County can do with a road right-of-way is to vacate it in accordance with the provisions of Chapter 36.87 RCW, Roads and Bridges -- Vacation. Caveat: See RCW 36.87.120 which purports to allow a county to sell the right-of-way when vacation of the road occurs.

THE USE OF A COUNTY ROAD.

A greater degree of care is required of one driving on the highway with a team of horses having a reputation for running away than is required of the driver of horses known to be gentle and reliable. Kimble v. Stackpole, 60 Wash. 35, 110 P. 677 (1904). (Comment: Perhaps this principle can be extended to the operation of junker cars on public streets.)

Just about anyone can use a highway. But even so, one does not have an inherent right to use highways for gain. Obstructions of highways by private parties is not allowed and offenders can be sued civilly, or criminally under Title 9 RCW as a nuisance. See the plethora of cases in Washington Digest 2d, Volume 19, Highways.

In McCullough v. Interstate Power & Light Co., 163 Wash. 147, 300 P. 165 (1931) the court found that the public easement in a highway includes the rights for every reasonable means for transmission of intelligence and transportation of persons and commodities which the advance of civilization may render suitable for highway use. (Comment: Now that is a broad interpretation, and it has to be constantly changing. One could wonder how it fits into the definition of a county road. Perhaps the basic physical nature and legal right has to exist before "the advance of civilization" comes into play.)

Privately owned facilities that can be defined as public utilities may be installed in a road right-of-way by franchise agreement, per the authority delegated to the counties in Chapter 36.55 RCW. The utility use is normally secondary to the road use and is allowed only when not inconsistent with the road use. However, in North Spokane Irrigation Dist. No. 8 v. Spokane County, 86 Wash.2d 599, 547 P.2d 859 (1975), the court held that when the right-of-way is dedicated, if it is dedicated simultaneously for utility use, the road purpose is not primary,

merely equal to utility use. This situation arises often in platting dedications, and perhaps such offers of dedication should be rejected by refusing to allow the plat to be recorded, because, if not, when those roads have to be reconstructed a county may not be able to make the utility companies pay the cost of relocation their facilities as we do with roads where the utility easements are not co-equal with the road easement.

Abutting property owners, presumably only those who own the fee underlying the road right-of-way, may use the highway for private purpose provided such use does not create a nuisance or interference with the highway use. Holm v. Montgomery, 62 Wash. 398, 113 P. 1115 (1911). Pierce County Department of Public Works & Utilities does allow private use of a road right-of-way by an abutting owner by license agreement.

RCW 36.75.040(5) allows a county to lease air above and lands below a county road provided the leasing does not interfere with vehicular travel. It is very difficult to understand how a county can lease out what it does not own. This statute, and RCW 36.87.120 (which authorizes charging for vacation of a road right-of-way), appear to be in direct conflict with the common law expressed in Burmeister and Finch.

VACATION OF A COUNTY ROAD.

Vacation of a county road can occur only in accordance with the provisions of Chapter 36.87 RCW. Chapter 36.87 RCW provides only two methods of vacation; one by operation of law for the reason of non-use, see RCW 36.87.090; and the other by action of the county legislative authority initiated either by its own resolution, RCW 36.87.010, or by petition of property owners, RCW 36.87.020.

There is a limited exception (isn't there always?) to the above rule. Roads created by the platting process set forth in Chapter 58.17 RCW, can be vacated by vacation of the plat. See RCW 58.17.212. The public notice requirements, and procedures for vacation of a plat are similar enough to road vacation under Chapter 36.87 RCW, so as to make the exception not much. A "belt & suspenders" approach would suggest that the notice procedures comply with both Chapters 36.87 and 58.17 RCW. But conceptually, when substance rather than form is analyzed, vacation of roads by vacation of a subdivision under Chapter 58.17 RCW is so similar in procedure and notice to vacation of roads under Chapter 36.87 RCW as to constitute a single procedure. Even so, this writer would recommend above "belt & suspenders" approach be followed.

The first thing to recognize about RCW 36.87.090, the so called non-user statute, is that it really has nothing to do with vacating roads; because, by definition, no road exists. It does define what constitutes abandonment of a road right-of-way easement. After the abandonment by operation of law, a county is barred from going onto the abandoned right-of-way to construct a road. The "barring" aspects of the statute is a truism. But how can a county be barred when the Supreme Court, in Todd, said the purpose of RCW 36.75.070 is to give counties incentives to trespass and build roads?

Whether or not a road right-of-way is abandoned by operation of law is purely a question of fact. The road was either opened within the requisite period, or not. If not, the right-of-way was abandoned by operation of law. In Van Sant v. Seattle, 47 Wn.2d 196, 199, 287 P.2d 130 (1955) the court said, in reference to the then equivalent of the current RCW 36.87.090, that:

> We have repeatedly held that this law is self-executing. (Citations deleted.)
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> While, as we said in Lewis v. Seattle, supra, [174 Wash. 219, 24 P.2d 427, 27 P.2d 1119 (1933),] a judicial determination is necessary to establish the vacation of record and free the land involved from the apparent record easement, this fact has significance only to those who purchase in reliance on the plat. The owner's failure to obtain such an adjudication does not restore to the public any interest which it has lost through nonuser.

It is clear that once the requisite 5-year period has passed, the road right-of-way has passed away (been vacated by operation of law).

Attorney James H. Morton, in the quiet title action of Geist & Rossi v. Pierce County, et al, Pierce County Cause No. 90 2 04536 3, argues that when the statute was changed in 1909 it was the intention of the legislature to allow a road to be vacated by operation of law any time it remained unopened for a continuous period of five years, rather than the 5-year period immediately following offer of dedication. Mr. Morton's opinion is based on rules of statutory construction, not case law. This writer would not stipulate to such an construction, even though it is not without merit, and Mr. Morton has not pursued his theory as of the date of this writing. The case is still pending as of the date of this writing.

It is interesting to note that the vacation procedures of Chapter 36.87 RCW, and the restriction on vacation set forth in RCW 36.87.130, apply only to county roads. If there is merely a right-of-way that has not been opened, a county road does not exist, and state law does not exist to control how or where a mere right-of-way can be abandoned.

Douglas W. Vanscoy, Deputy Prosecuting Attorney, prosecuted the case of Pierce County v. United States of America in the United States District Court for the Western District of Washington at Tacoma, Cause No. C92-5166B (formerly Cause No. C91-5371B).

The defendant, acting through McChord Air Force Base, physically closed Woodbrook Road in reliance on a recorded notice of abandonment of easement signed by Joe Stortini, in his then capacity as county executive. Mr. Vanscoy moved the court for a summary judgment that Mr. Stortini was without authority to abandon a county road and asked the court to find that the road was not, in fact abandoned, and for an order directing the Air Force to remove the barriers. The court, in the person of the Honorable Robert J. Bryan, Judge, did grant the motion for summary judgment insofar as the issue of abandonment was concerned. The arguments of Mr. Vanscoy, in his memorandum in support of his motion, conclusively demonstrate that only a county's legislative authority can vacate a county road, with the exception of when vacation occurs by operation of law. Excerpts from Mr. Vanscoy's memorandum follow:

> On May 25, 1990, without public notice or hearing, and indeed without any action by the legislative body of Pierce County, County Executive Joe Stortini signed and provided to the Air Force a document purporting to relinquish Pierce County's interest in Woodbrook Road. It is Pierce County's position that Mr. Stortini's action was without legal effect. "Property once acquired and devoted to public use is held in trust for the public and cannot be alienated without legislative authority, either express or implied." Nelson v. Pacific County, 36 Wn.App. 17, 23, 671 P.2d 785 (1983), rev. denied, 100 Wn.2d 1037 (1984).
>
> If a county road is to be relinquished, RCW 36.87 sets forth the specific procedure which must be followed, including a legislative resolution of intention to vacate, a report by the county road engineer, notice of public hearing concerning that report, and final action by the county legislative authority. Much like the

easement and 10 U.S.C. § 2668(c), each of the pertinent sections of the Revised Code speaks in terms of "abandonment" of the county road, as, for example, RCW 36.87.010:

> When a county road or any part thereof is considered useless, the board by resolution entered upon its minutes, may declare its intention to vacate and abandon the same or any portion thereof and shall direct the county road engineer to report upon such vacation and abandonment. (Emphasis added.)

Similarly, the words "abandon" and "abandonment" or the like appear in RCW 36.87.020 and .030 (concerning the freeholder's petition), RCW 36.87.040 (concerning the engineer's report), RCW 36.87.050 (concerning notice of the hearing) and in RCW 36.87.060(1) (concerning the hearing by the county legislative authority). It is clear these sections address the abandonment of county roads, which is the identical issue addressed by numbered paragraph 8 of the 1958 easement[2] and by 10 U.S.C. § 2668(c).

RCW 36.87.060 expressly provides, then, the means under state law for abandoning a county road:

> (1) On the day fixed for the hearing, the county legislative authority shall proceed to consider the report of the engineer, together with any evidence for or objection against such a vacation and abandonment. If the county road is found useful as a part of the county road system it shall not be vacated, but if it is not useful and the public will be benefited by the vacation, the county legislative authority may vacate the road or any portion thereof. Its decision shall be entered in the minutes of the hearing. (Emphasis added.)

In ruling that a municipal council was limited to the vacation proposed in the petition before it, the Supreme Court of Washington stated as follows in

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[2]The mentioned easement is the one granted to Pierce County by the United States for Woodbrook Road.

Brazell v. Seattle, 55 Wash. 108, 185, 104 Pac. 155 (1909):

> Power to vacate streets and highways is vested in the legislature, and may be delegated by it to municipalities, which has been done in this state. There is in a city council no inherent power to vacate streets, and when such power has been delegated to it by the legislature the procedure therefor which the statute provides must be strictly followed. . . .

In the present case, there was not merely a violation of procedure by the municipal legislative authority, but no notice, hearing or action of any kind by the Council.

Pierce County respectfully submits that so far as state law is concerned, this case is controlled by Nelson v. Pacific County, 36 Wn.App. 17, 671 P.2d 785 (1983), rev. denied, 100 Wn.2d 1037 (1984). The realty at issue in that case had been dedicated to Pacific County as a public highway. 36 Wn.App. at 18. Counsel for Pacific County on the day of trial, with the informal approval of the county commissioners, entered into a "settlement" on the court record in which the County purported to relinquish its interest in some of the disputed property. 36 Wn.App. at 19. After the trial between the remaining parties had concluded, Pacific County convinced the trial court to set aside the settlement it had reached. The Court of Appeals affirmed, finding that Pacific County had not manifested a clear intent to relinquish its interest in the property. 36 Wn.App. at 22. The court went on as follows with an analysis which is equally applicable in the present case, 36 Wn.App. at 23 (citations omitted):

> Moreover, we conclude that the County may not abandon dedicated property in this manner. Unquestionably the County may compromise claims arising out of subject matter concerning which it has the general power to contract. The Nelsons' position is flawed, however, because the alienation of dedicated public property cannot be accomplished by contract. Property once acquired and devoted to public use is held in

> trust for the public and cannot be alienated without legislative authority, either express or implied. The Legislature has expressly provided for disposition of lands held by the County in its government capacity. Numerous sections of RCW Title 36 deal with this subject. (Emphasis added.)

The court went on to survey various sections of Title 36, including RCW 36.87 pertaining to the abandonment of roads, and concluded, "The provisions are comprehensive and demonstrate a strong legislative intent that property held for the public use and benefit not be summarily disposed of without giving the public affected a significant opportunity to participate." 36 Wn.App. at 24.

If legal counsel for Pacific County cannot, on the record of a court proceeding and with the informal approval of the board of commissioners, effectively abandon part of the county's interest in a public highway, then surely a county executive, acting extrajudicially and with no councilmanic approval, cannot effectuate the complete abandonment of all Pierce County's interest in a county road which has existed for over 70 years. Here, much more so than in Nelson, there was a violation of the strong legislative intent that there be no summary disposition of property held for the public benefit without providing the affected public a proper opportunity to be heard.

When the legislative authority of a county does act to vacate a road, such vacation can only be done if ". . . the public will be benefited by the vacation . . .". See RCW 36.87.060. Also, in RCW 36.87.140, the vacation ordinance can reserve easements for public utilities existing in the right-of-way at the time of vacation.

Two issues recently arose in Pierce County concerning 1. reservation of an easement for storm drainage, and 2. rights of access to abutting properties along the country road to be vacated.

With regards to reservation of a storm drainage easement, it was reasoned that a storm drainage facility might fall into the category of a public utility, but even if it would not, the public would not be benefited by vacating the rights of Pierce County to maintain existing drainage facilities upon which the

health, safety and welfare of the public depend. And so, a reservation of a storm drainage easement for an existing facility can fall within the findings of public benefit that must be made under RCW 36.87.060.

There was no way it could be found that a county has a right to reserve an easement across private property for the benefit of other private property when vacating a county road. It was reasoned, however, that it would not be to the benefit of the public to vacate a county road without a voluntary agreement amongst the owners to provide each other rights of ingress and egress.

THE CONCLUSION.

When viewed as a whole, the law (statutory law as well as case law) surrounding county roads is almost surprisingly compact and well integrated, even with its occasional conflicts and loose ends.

The fact that a county does not own its roads seems to be most startling to many; including,it is suspected, the legislators who adopted RCW 36.75.040(5) and RCW 36.87.120 (The provisions that allow leasing and charging for vacation.)

The biggest gap in the law is the control, or lack thereof, a county has over a right-of-way that has been dedicated but never opened. The common law of easements, vis-a-vis the owner of an easement, allows the underlying fee owner to use the land covered by an easement in anyway that is not inconsistent with the use of the easement. This common law principle has carried through to roads. It seems reasonable, therefore, that an abutting owner could use the unopened right-of-way as his/her property. That is how adverse possession occurred in Erickson Bushling, above. But the question remains with regards to an abutting property owner taking access along an unopened right-of-way, across intervening properties. Can a county regulate such use? If so, when does a regulation become a taking in such a context? If several parties are using a county road right-of-way that has not been officially opened and maintained by the county, can a county restrict other uses such has delivery trucks, emergency vehicles, and so on? Regardless of abutting property owner use, or lack, does the public at large have a right to start developing the right-of-way? The legislature should do some work on defining the responsibilities and rights and duties of the various parties with regards to unopened county road rights-of-way.

After shuffling through all the statutes and case law, the definition of a country road is extremely taut. When stripped of the jurisdictional distinctions, the elements of a county road are reduced to two: 1. The public has to have a legal right of passage; and 2. There has to be a physical roadway. Without the right of passage, the road, if any, is probably some form of private road. Without a physical roadway, there is merely an easement.

It is almost fascinating to perceive what appears to be deliberate intelligence (one really should not be so naive) behind the concepts that strips of lands can become county roads by myriad means, some, as said above, almost by accident in some situations, but there is only one very restrictive and detailed way a county road can be vacated. The law is like a big funnel that captures many things but only lets them out, if at all, in a thin, slow, deliberate stream.

The hard fact is that counties have virtually no flexibility when trying to get rid of a road. Get rid of the road the way Chapter 36.87 RCW requires, or not at all. The reason why this lack of flexibility exists can be divined from the definition of a county road, i.e., for public vehicular travel. And, although there is no statutory definition of "public", it can only mean everybody; not an abutting property owner, not a neighborhood, not a public works department, not a county in which the road is located, but, in fact, everybody.

The way one should view a county's role vis-a-vis its roads is as a trustee. A trustee takes care of something that is owned by another, for the benefit of the beneficiary of the trust. A county does not own its roads, it merely takes care of them, it holds them in trust for the public.